UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALLSERVICE PLUMBING AND
MAINTENANCE, INC.

and Cases 15-CA-019433
15-CA-019456
15-RC-008819

UNITED ASSOCIATION OF JOURNEYMAN
AND APPRENTICES OF THE PLUMBING
INDUSTRY OF THE UNITED STATES AND
CANADA, LOCAL 198

Zachary E. Herlands and *Charles R. Rogers,* for the General Counsel.
Thomas R. Peak, Esq., Baton Rouge, LA, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This supplemental proceeding was tried before me in New Orleans, Louisiana on March 12, 2013 pursuant to a compliance specification and notice of hearing issued on December 31, 2012. The compliance specification alleges the amount of backpay due under the terms of the National Labor Relations Board's Order (the Board's Order), dated January 18, 2012, adopting the findings and conclusions set forth by Administrative Law Judge Robert A. Ringler in his Decision, issued December 1, 2011.

Judge Ringler's Decision in the above-captioned unfair labor practice proceeding directed Allservice Plumbing and Maintenance, Inc. (the Company), its officers, agents, successors and assigns, take certain affirmative action, including offering former employees Brady Barbour, Doug Diamond, and Michael Grimes reinstatement to their former positions and making them whole for any loss they may have suffered as a result of the Company's unlawful layoff in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). In Barbour's case, there was an additional conclusion that Barbour's layoff violated Section 8(a)(4) of the Act. With respect to the remedy, Judge Ringler ordered that backpay be computed on a quarterly basis from the date of the layoffs to the date when offers of reinstatement were made, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

THE COMPLIANCE SPECIFICATION

The compliance specification alleges that the Company has refused to reinstate said employees and provide the backpay due under the terms of the Board's Order. Accordingly, the compliance specification alleges, based on the calculations of Debra Warner, Region 15's Compliance Officer, that Barbour and Diamond are due accrued backpay since their layoff on January 22, 2010, and Grimes since his layoff on February 11, 2010. The compliance specification proposed to measure the gross backpay due the discriminateees based on the hours and earnings of comparable employees (comparators) hired for plumbing work since they were laid off. After computing gross backpay and interim earnings during the backpay period, net backpay owed the discriminatees through August 18, 2012 was alleged as follows: Barbour – $31,775; Diamond – $51,925; Grimes – $23,583. The total backpay alleged, as of August 18, 2012, was $107,283, plus daily compound interest accrued to the date of payment pursuant to the Order.[1]

In selecting appropriate comparators, Warner relied on payroll records produced by the Company through August 18, 2012. She relied on seniority to determine applicable journeyman plumbers who worked subsequent to the layoff dates for Barbour on January 22 and Grimes on February 11. With respect to Diamond, Warner relied on apprentices who worked subsequent to his layoff on January 22.[2] With respect to any backpay period that the Company did not employ less senior plumbers and/or apprentices than the discriminatees, backpay was tolled until a less senior plumber or apprentice was hired.[3] Relying on Social Security Administration earnings statements, Warner then discounted gross backpay by the discriminatees' interim earnings, added applicable expenses, and arrived at the aforementioned net backpay amounts. However, as the Company has not offered reinstatement to the discriminatees, the backpay period continues and the backpay amounts owed them continue to increase.[4]

THE COMPANY'S OBJECTIONS TO THE COMPLIANCE SPECIFICATION

The Company, in its amended answer to the compliance specification, contends that the backpay remedies proposed by the General Counsel are flawed because they fail to account for the Company's significant downturn in business in early 2010 and thereafter. The Company also raised specific objections regarding the qualifications and performance of the discriminatees.[5] As I noted at trial, Judge Ringler previously concluded that the Company's operations and employee complement, as well as the alleged performance and qualifications of the discriminatees, did not

[1] The Company presented no alternative to Warner's application of the comparator method pursuant to "Section 10540.3 of the NLRB Casehandling Manual Part 3, Compliance Proceedings (Compliance Manual), Formula Three."

[2] I found Warner's testimony extremely credible and corroborated by the payroll evidence provided by the Company. (GC Exh. 2(a) and (i); Tr. 21-24, 153.)

[3] GC Exh. 2(i); Tr. 24, 46, 110-111.

[4] The Company did not challenge any of the General Counsel's evidence or calculations relating to interim earnings and applicable expenses. (GC Exh. 5-9.)

[5] R. Exh. 1-5, 24.

justify laying them off in January and February 2012. Whether the same economic circumstances continued after February 2012 is an issue for determination in this proceeding.[6]

In his findings regarding the Company's layoff practices, Judge Ringler acknowledged the contention of Luke Hall, the Company's vice president and general manager, that the Company generally follows a policy of "[laying] off its workers, in accordance with a 'last hired, first released' system," but "that this system does not always work, and that he also considers the ratio of helpers, laborers, apprentices, and plumbers needed for upcoming projects."[7] With respect to Hall's contention that the discriminatees were laid off because he was employing too many workers and the Company was not being awarded bids at that time, however, Judge Ringler found that the stated reasons were contrary to the credible evidence, pretextual and unlawful.[8]

The Company contends that it is a much smaller business operation now than it was in January and February 2010 when the discriminatees were laid off. The employee roster as of January 11, 2010 consisted of 17 employees, including Barbour, Diamond and Grimes.[9] A review of the payroll records reveals that the Company's workforce thereafter did, indeed, fluctuate after that time. For purposes of determining a make-whole remedy, however, Luke Hall's lack of credibility in the unfair labor practice proceeding, as well as the current proceeding, warrants continued reliance on seniority-based hiring, that is, the last-hired, first released system, without exception for alleged qualifications and performance issues that Hall never addressed prior to February 2012.[10]

In addition to its substantive objections, the Company also contests the Board's jurisdiction in this proceeding. Relying on the Court of Appeals' recent decision in *Noel Canning v. NLRB*, 705 F.3d 490, 507 (DC Cir. 2013) ruling that the Board currently lacks a quorum of three members, the Company contends in its post-hearing brief that the Board's January 18, 2012 Order is invalid, must be vacated and cannot be enforced. In addition to the fact that it failed to amend its answer to plead such a defense, the Company's argument lacks merit. Board judges are bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. See, e.g., *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981 and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963, enfd. in part 331 F.2d 176 (8th Cir. 1964). Most recently, in *G4S Regulated Security Solutions,* 359 NLRB No. 101, slip op. at 1, fn. 1 (2013), the Board rejected this argument on the ground that the "decision conflicts with the decisions of at least three other courts of appeals" (citations

[6] I used February as a benchmark because that is the month when Grimes, the last of the three discriminatees, was laid off.

[7] GC Exh. 2(a) at 11.

[8] GC Exh. 2(a) at 19-23

[9] Joint Exh. 1.

[10] Just as Judge Ringler did, I also found Hall to be a less than credible witness. In this particular proceeding, his credibility was diminished significantly by his partial compliance with the General Counsel's subpoena duces tecum, coupled with his disavowal of payroll records that he did produce. As such, I did not credit any of his testimony that sought to inject variable considerations into the seniority system.

omitted) and this issue "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." (citation omitted).

BRADY BARBOUR

Barbour's backpay period started when he was laid off on January 22, 2010. Gross backpay was determined by relying on the earnings of the following journeyman plumbers as follows: Brian Hernandez for the period of January 25 to June 6, 2010, except for the week ending March 27, 2010, when Lawrence Vince is used as the comparator; Raymond Machuca for the period of June 7 to August 1, 2010; Detric Jackson for the period of August 2, 2010 to August 13, 2011,[11] except the week ending July 2, 2011, when Vincent Foulcard was used as the comparator; Vincent Foulcard for the period of August 14 to October 22, 2011; and Claude Norris for the period of October 23, 2011 to August 18, 2012. In addition, the amounts were adjusted for annual increases to salary as reflected by the salaries of comparable employees throughout the backpay period.[12] Barbour's gross backpay was not tolled throughout the backpay period because the Company continued to employ plumbers with less seniority than Barbour.[13] As a result, after discounting Barbour's gross backpay by his interim earnings, and after adding expenses, his net backpay totals $31,775 as of August 18, 2012.

DOUG DIAMOND

Diamond's backpay period started when he was laid off on January 22, 2010. Gross backpay was determined by relying on the earnings of the following apprentice plumbers as follows: Ricky Pourciau for the period of January 30 to October 9, 2010, except the week ending May 17, 2010 when S. Graves used was used as the comparator; Claude Norris II for the period of October 11, 2010 to October 15, 2011; and Howard Hall for the period of October, 16, 2011 to August 18, 2012.[14] In addition, the amounts were adjusted for annual increases to salary as reflected by the salaries of comparable employees throughout the backpay period. Diamond's gross backpay was not tolled throughout the backpay period because the Company continued to employ apprentices with less seniority than Diamond.[15] As a result, after discounting Diamond's gross backpay by interim earnings, and after adding applicable expenses, his net backpay totals $51,925 as of August 18, 2012.[16]

[11] The Company objected to the use of Jackson as a comparator for Barbour and Grimes because he had seniority over both. However, Warner credibly relied on Jackson because he was rehired on June 28, 2010 after being separated from the Company for nearly a year. (Tr. 42, 103.) In the absence of reliable evidence of a Company practice to the contrary, I find that Grimes and Barbour would have had seniority over Jackson.

[12] GC Exh. 2(a) and (i); Tr. 25-41.

[13] GC Exh. 2(i), Appendix 1.

[14] The Company objected to the use of Howard Hall as a comparator because, with an initial hire date of March 5, 2007, he was more senior to Diamond; Howard Hall was hired on March 5, 2007, while Diamond began working on July 13, 2009. (R. Exh. 24 at 8.) That objection is unfounded, however, as Warner credibly explained that Howard Hall worked as a *laborer* from March 2007 until he was promoted to *apprentice* after Diamond was laid off. (Tr. 113-114.) The initial payroll records provided by the Company, upon which the compliance specification was based, confirms Howard Hal's promotion to apprentice on January 2, 2011. (GC 2(i), Appendix 1 at 20.)

[15] GC Exh. 2(a) and (i), Appendix 1; Tr. 50-58, 122-123.

[16] Diamond's net backpay is subject to a significant reduction in the event that pending requests for

MICHAEL GRIMES

Grimes's backpay period started when he was laid off on February 11, 2010. Gross backpay was determined by relying on the earnings of the following journeyman plumbers as follows: Detrick T. Jackson for the period of June 28 to July 31, 2010; Vincent Foulcard for the period of August 2, 2010 to August 13, 2011, except for the week ending July 2, 2011; Jervier Maxwell for the period of March 4 to May 5, 2012;[17] Vincent Foulcard for the period of July 15 to August 18, 2012. In addition, the amounts were adjusted for annual increases to salary as reflected by the salaries of comparable employees throughout the backpay period. Grimes' gross backpay was tolled for four separate periods during which the Company did not employ any plumbers with less seniority: February 11 to June 28, 2010, the week of June 26, 2011, August 13, 2011 to March 4, 2012, and May 5 to July 15, 2012. As a result, after discounting Grimes gross backpay by his interim earnings, and after adding expenses, his net backpay totals $23,583 as of August 18, 2012.[18]

LEGAL ANALYSIS

In compliance proceedings, the Board seeks to place the discriminatees, as nearly as possible, in the same financial position they would have enjoyed but for the illegal discrimination. *Phelps-Dodge Corp. v. NLRB*, 313 NLRB 177, 194 (1941). A backpay award, because of the wrongful conduct necessitating its calculation, almost always involves some ambiguity and estimation, and therefore, is meant to be a reasonable approximation. *Cobb Mechanical Contractors,* 333 NLRB 1168 (2001). In seeking to objectively reconstruct backpay amounts as accurately as possible the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Fiction Corporation,* 335 NLRB 1117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

The Region has the burden of establishing gross backpay. *Minette Mills, Inc.,* 316 NLRB 1009, 1010-1011 (1995). However, forecasting the future business climate and employee complement of a Company is often difficult, if not an impossible endeavor. Accordingly, the General Counsel is allowed a wide discretion in picking a formula." See *Moran Printing,* 330 NLRB 376 at 376-377 (1999). The standard merely requires that the gross backpay amounts contained in a backpay specification be reasonable and not arbitrary approximations. *Bagel Bakers Council of Greater New York v. NLRB,* 555 F.2d 304, 305 (2d Cir. 1977); *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Hacienda Hotel and Casino,* 279 NLRB 601, 603 (1986); *Virginia Electric Co. v. NLRB,* 219 U.S. 532, 544 (1984).

Once the General Counsel has introduced the gross pay due to each discriminatee, the burden shifts to the respondent to establish affirmative defenses that would eliminate or

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Social Security Administration earnings statements justify such a revision. (GC Exh. 2(i), Appendix 3; GC Exh. 7; Tr. 79, 283.)

[17] The Company objected to the use of Maxwell as a comparator because it alleged that he was only a weekend employee. That objection lacks merit. Warner credibly testified that she used Maxwell as a comparator because he was listed as a plumber and had less seniority because March 4, 2012 is the first time he showed up on the payroll records provided by the Company. (Tr. Tr. 47, 112, 122.)

[18] GC Exh. 2(i), Appendix 1 and 4; GC Exh. 5-6; Tr. 42-49.

otherwise reduce its backpay liability. *Church Homes,* 349 NLRB 829, 838 (2007); *Centra,* 314 NLRB 814, 819-820 (1994); *Florida Tile Co.,*310 NLRB 609 (1993); *Hacienda Hotel and Casino,* supra at 603. Any uncertainties in the amount of backpay due are resolved in favor of the discriminatees and against the respondent. *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998); *Minette Mills, Inc.,* supra at 1010-1011; *United Aircraft Corp.,* 204 NLRB 1068 (1973).

The General Counsel has met its burden of proof with the submission of a reasonable compliance specification specifying the amounts of backpay for each discriminatee. The method of calculating backpay utilized by the Region's compliance officer is a reasonable approach to the Company's fluctuating business and is based on the Company's payroll records and Social Security Administration earnings statements. The Company did not challenge either the method used to compute gross backpay or interim earnings used in arriving at net backpay owed each discriminatee.

Notwithstanding the General Counsel's proof, the Company contends that its backpay liability is tolled because the discriminatees would have been laid off for lawful reasons during future periods. See *Comar, Inc.,* 349 NLRB 342, 361 (2007); *Weldun International*, *Inc.*, 340 NLRB 666, 674 (2003). In his decision, however, Judge Ringler concluded that the Company's operations and employee complement were pretextual for its laying off the discriminatees in January and February. As such, Judge Ringler's decision, as the law of the case, negates any argument regarding the Company's operations and employee complement prior to and including February 2012. For that reason, I precluded its attempts to relitigate that issue. *Transp. Serv. Co.,* 314 NLRB 458, 459 (1994); *Sumco Mfg. Co.,* 267 NLRB 253, 254 fn. 2 (1983).

Regarding the backpay period since March 2012, the payroll records demonstrate that, except for the four tolled periods applicable to Grimes' backpay, the Company has continued to employ plumbers and apprentices with less seniority that the discriminatees. The Company failed to meet its burden for tolling backpay since it presented no alternative calculations or comparators. *Flaum Appetizing Corp.,* 357 NLRB No. 162, slip op. at 2 (2011); *South Coast Refuse Corp.,* 337 NLRB 841 (2002). It did, however, challenge the use of several comparators, which I determined to be unfounded.[19] Under the circumstances, Warner reasonably relied on comparators for the backpay period calculations. *John T. Jones Construction Co., Inc.*, 352 NLRB 1063, 1068 (2008); *Kan. Refined Helium Co.,* 252 NLRB 1156, 1157 (1980).

CONCLUSION

The General Counsel met his burden of showing the amount of gross backpay due to Barbour, Diamond and Grimes. Moreover, after deducting interim earnings during the backpay period, the General established their net backpay. The Company did not meet its burden of establishing any affirmative defenses to mitigate its liability. Accordingly, I accept the backpay specification in all respects, and conclude that Barbour, Diamond and Grimes are entitled to the full amount of net backpay calculated by the Region.

[19] See footnotes 11, 14 and 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

It is hereby ordered that the Respondent, Allservice Plumbing and Maintenance, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall pay Brady Barbour the sum of $31,775, Doug Diamond the sum of $51,925, and Michael Grimes the sum of $23,583, for a total amount of backpay of $107,283,[21] together with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds, *Jackson Hospital Corp. v. NLRB*, 647 NLRB F.3d 1137 (D.C. Cir. 2011) accrued to the date of payment and minus tax withholding required by Federal and State laws.

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express*, 359 NLRB No. 44 (2012).

Dated, Washington, D.C. May 2, 2013

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Michael A. Rosas
Administrative Law Judge

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] As noted above, this amount only covers net backpay through August 18, 2012 but continues to accrue until valid offers of reinstatement are made.